SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1276

THE TROXEL MANUFACTURING COMPANY

v.

SCHWINN BICYCLE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Troxel Manufacturing Company (Troxel) petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Sixth Circuit in this case entered August 11, 1972, and December 19, 1973.

OPINIONS BELOW

The opinion of the District Court for the Western District of Tennessee, by Chief Judge Bailey Brown, is reported at 334 F.Supp. 1269. The first opinion of the Court of Appeals for the Sixth Circuit, by Chief

Judge Harry Phillips, is reported, at 465 F.2d 1253. The second opinion of said Court has not yet been reported. Said opinions are printed as Appendices A, B and C, respectively, to this petition.

JURISDICTION

The final judgment of the Court of Appeals was dated and entered on December 19, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1332, relating to diversity of citizenship and amount in controversy; and under 28 U.S.C. § 1254(1) relating to certiorari from a United States Court of Appeals.

THE QUESTIONS PRESENTED

1. Is a licensee under an invalid patent legally obligated, *after a judicial declaration of invalidity,* to pay royalties for the time the patent was in litigation?

2. Is a licensee under an invalid patent legally entitled, after a judicial declaration of invalidity, to recover royalties paid on the invalid patent prior to such judgment?

3. Even if a licensee under an invalid patent were legally obligated, after an adjudication of invalidity, to pay royalties for the time prior to such judgment, would the obligation cease on the date of the judgment of invalidity by the trial court, or only upon affirmance by the final appellate court?

STATUTES INVOLVED

This case does not involve the construction of any specific statute, but rather the effectuation of important federal patent policies, as expressed in *Lear v. Adkins,* 395 U.S. 653, 23 L.Ed.2d 610, 89 S.Ct. 1902.

STATEMENT OF THE CASE

This case presents a claim by Petitioner, The Troxel Manufacturing Company of Moscow, Tennessee against the Schwinn Bicycle Company of Chicago, Illinois (Schwinn) for recovery of royalty payments made to Schwinn under an invalid patent, and a claim by Schwinn for unpaid royalties under said invalid patent, jurisdiction being based upon 28 U.S.C. § 1332, the parties having diversity of citizenship and the amount in controversy exceeding $10,000.

In December, 1966, Schwinn charged Troxel with infringement of Schwinn's bicycle saddle patent No. D 204,121, and threatened suit for damages resulting from the infringement. (R. 33)[1] On June 1, 1967, rather than litigate, Troxel accepted a non-exclusive License Agreement from Schwinn, obligating Troxel to pay a royalty on all saddles covered by the above patent. (R. 23).

On January 8, 1969, Schwinn's patent was declared invalid by the District Court of the Northern District of California in *Schwinn Bicycle Company* v. *Goodyear Tire and Rubber Co.*, 160 U.S.P.Q. 587 (R. 29). Schwinn appealed, and the district court's judgment was affirmed on December 22, 1970 by the Court of Appeals for the Ninth Circuit (444 F.2d 295). (R. 38-48).

After the District Court's adjudication of the invalidity of the patent, Troxel attempted to cease paying royalties and hold the payments in escrow pending appeal, but Schwinn filed suit in Ohio against

[1]References are to pages in the printed record in the Court of Appeals. Petitioner has requested the clerk of that court to certify the printed record to this Court, pursuant to Rule 21 of this Court.

Troxel for the royalties, and Troxel, rather than litigate the validity of the patent there, succumbed and resumed its royalty payments. (R. 6). When the District Court's adjudication of the invalidity of the patent was sustained by the Court of Appeals, Schwinn terminated its claim for royalties as of the date of affirmance, December 22, 1970. (R. 22)

Troxel then commenced this action in the United States District Court for the Western District of Tennessee for: (a) all royalties paid on the invalid patent, in the amount of $125,915.25, plus interest from the date of each payment; or in the alternative (b) the total royalties paid after the date of the judgment of the District Court holding the patent invalid, in the amount of $77,158.55, plus interest from each payment; and (c) for declaratory judgment that it did not owe Schwinn royalties for the last quarter of 1970, through December 22, in the amount of $9,315.55, which had not been paid.

Schwinn answered, admitting the controlling factual allegations of the complaint, but counterclaiming for the unpaid royalties for the final quarter of 1970.

The United States District Court for the Western District of Tennessee granted Troxel's motion for summary judgment for the recovery of all royalties paid on the invalid patent, relying upon the ruling in *Lear, Inc.* v. *Adkins,* 395 U.S. 653, that federal patent policies forbade the recovery of royalties on invalid patents, and holding that "a licensee who has paid royalties should [not] be in a worse position than one who has not." (App. A, p. 4a)

The United States Court of Appeals for the Sixth Circuit reversed and remanded the District Court's

decision.[2] The Court of Appeals concluded that allowing a licensee under an invalid patent to recover royalties paid would defeat early adjudication of validity or invalidity of patents by licensees, and would discourage the securing and licensing of patents. The court found that allowance of Troxel's claim would unnecessarily extend the doctrine of *Lear,* but that *Lear* was available as a defense by Troxel upon remand for disposition of Schwinn's counterclaim.

Upon remand, Troxel moved to amend its pleadings to state an alternative cause of action consistent with

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[2] The first decision of the Court of Appeals, reported at Appendix B, will be properly before this Court for review upon the grant of the writ of certiorari applied for herein. The rule was stated by this Court in *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1964), where a writ of certiorari was granted following the second decision of the court of appeals, as follows:

> We now "consider all of the substantial federal questions determined in the earlier stages of the litigation. . . .", *Reece* v. *Georgia*, 350 U.S. 85, 87, 100 L ed 77, 81, 76 S Ct 167, for it is settled that we may consider questions raised on the first appeal, as well as "those that were before the Court of Appeals upon the second appeal." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257, 60 L ed 629, 633, 36 S Ct 269. Cf. *Urie* v. *Thompson*, 337 U.S. 163, 171-173, 93 L ed 1282, 1293, 1294 69 S Ct 1018, 11 ALR2d 252; *Messenger* v. *Anderson*, 225 U.S. 436, 444, 56 L ed 1152, 1156, 32 S Ct 739.

In addition, since the first decison of the court of appeals remanded the case for further proceedings, a petition for certiorari was not required at that time, the district court having had the discretion to permit new issues to be raised by amended pleadings. *Rogers* v. *Hill*, 289 U.S. 582, 588 (1933); see 3 Moore's Federal Practice § 15.11 at 971 n. 15 (2d ed. 1972). Finally, since the court of appeal's first decision left undecided Schwinn's counterclaim, the judgment, under Rule 54 of the Federal Rules of Civil Procedure, in the absence of an express determination that there was no just reason for delay, could "not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all parties."

the Sixth Circuit's rationale. Schwinn moved for summary judgment on its counterclaim for unpaid royalties on the invalid patent. The District Court denied both motions.

On the second appeal by both parties, the Court of Appeals for the Sixth Circuit affirmed the district court's denial of Troxel's motion to amend its pleadings, but reversed the District Court's denial of Schwinn's motion for summary judgment, holding Schwinn was entitled to royalties accruing up to the date of the affirmance of the lower court's adjudication of the patent's invalidity by the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Court of Appeals are in direct conflict with the principles of law and the strong federal patent policies expressed in *Lear* v. *Adkins,* 395 U.S. 653 (1969).

In *Lear,* this Court held that a licensee *could not be required to continue paying royalties on an invalid patent* while challenging the validity of the patent in the courts. The court of appeals in this case held, to the contrary, that the licensee *was obligated to pay royalties on an invalid patent* up to the date of the final appellate adjudication of invalidity.

Furthermore, this Court held in *Lear* that the licensee, Lear, "must be permitted to avoid the payment of all royalties accruing after Adkins' 1960 patent issued if Lear can prove patent invalidity." (395 U.S. at 674). The Court of Appeals in this case expressly declined to accept the above ruling as an authoritative precedent, but restricted it to "the facts which were before the Court in that case." (App. B, p. 15a). It held that the licensee *may not be permitted* to avoid

payment of royalties accruing after the invalid patent issued, at least until the date of the final appellate decree of invalidity.

2. The decisions of the Court of Appeals are in direct conflict with the decision of the Court of Appeals of the Seventh Circuit in *Beckman Instruments, Inc.* v. *Technical Development Corp.*, 433 F.2d 55 (1970) (*cert. denied* 401 U.S. 976. 1972). In *Beckman*, the Court of Appeals construed *Lear* to hold "that patent invalidity must be made a complete defense to the obligation to pay royalties." 433 F.2d at 59. In *Troxel*, the Court of Appeals held, to the contrary, that the invalidity of Schwinn's patent was not a complete defense to Troxel's obligation to pay royalties, but instead granted judgment for royalties on the invalid patent.

Beckman rejected the licensor's contention that "it is unfair for licensees to use the patent and accept the benefits of the license and then attack the validity of the patent" (433 F.2d at 59), holding that *Lear* had rejected similar arguments. But *Troxel* cited, as a ground for denying recovery of royalties paid on the invalid patent, the fact that "all this time [Troxel] had the benefit of freedom from suit for infringement and agreement of Schwinn to attempt to halt unlicensed infringers." (App. B, p. 17a).

This Court in *Lear* held that "overriding federal policies would be significantly frustrated if licensees could be required to continue to pay royalties during the time they are challenging patent validity in the courts." (395 U.S. at 673). The opinions in *Troxel*, upholding the licensor's right to royalties during the litigation of an invalid patent, significantly frustrate these overriding federal policies.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

I.

The Rationale of The Court of Appeals Is in Direct Conflict with Lear v. Adkins.

In *Lear* v. *Adkins* this Court carefully considered the conflict between the principles of contract law forming the basis of the doctrine of licensee estoppel and the public's interest in the "full and free competition in the use of ideas" (395 U.S. at 670) and "the elimination of specious patents." (395 U.S. at 674 n.19). This Court resolved the conflict in favor of the interests of the public, finding the technical requirements of contract doctrine would mean "the public may continually be required to pay tribute to would-be monopolists without need or justification." (395 U.S. at 670). This Court held that the contractual rule that the licensee must continue paying royalties until the patent was declared invalid significantly frustrated "overriding federal policies" and was void as "inconsistent with the aims of federal patent policy." (395 U.S. at 673).

The Sixth Circuit on the other hand, has reverted exclusively to the technical requirements of contract doctrine for a determination of both appeals in this case. The court of appeals relied upon its decision in *Drackett Chemical Co.* v. *Chamberlain,* 63 F.2d 853 (1933), for the "established rule in this Circuit for nearly forty years that *a final adjudication of invalidity* of a licensed patent operates as an eviction from the license, terminating the licensee's obligation to continue making royalty payments *after that date* . . ." (Appendix B, p. 8a) (Emphasis added). The court held *Lear* did not overrule *Drackett*, and that the latter case "remains the law of this Circuit except in-

sofar as it expresses the licensee estoppel doctrine." (Appendix B, p. 15a).

The rationale of the *Drackett* decision is firmly embedded in precisely the type of technical requirements of contract doctrine which this Court in *Lear* subordinated to overriding federal patent policies. *Drackett,* unlike *Lear,* held that a license contract continued to be operative until there was an "eviction" by judicial declaration of invalidity of the patent, destroying the "monopoly" created by the license. The Court said:

> Prior to such eviction, *the mere invalidity of the patent is properly held not to be sufficient defense* [to a claim for royalties], because the licensee may still continue to enjoy all the benefits of a valid patent. It may be respected, and the licensee would then have just what he bargained for . . . . It is only when, by judicial decree or otherwise, it is published to the world that the monopoly is destroyed, that the licensee can claim a corresponding release from his obligation to pay royalties. (63 F.2d at 854) (Emphasis supplied)

The *Drackett* rationale, adopted by the Court of Appeals in this case, is diametrically opposed to this Court's holding in *Lear* that strong federal patent policy must override contract doctrine, and that licensees cannot be required to pay royalties pending a final judicial declaration of patent invalidity.

II.

The Opinions Below Frustrate the Public Policies Underlying the Lear Doctrine of Promotion of Free Competition of Ideas and Discouragement of Specious Patents.

The overriding federal policy which *Lear* recognizes and promotes is "the important public interest in permitting full and free competition in the use of

ideas which are in reality a part of the public domain." (395 U.S. at 670). This Court said that "federal law requires that all ideas in general circulation be dedicated to the public good unless they are protected by a valid patent." (395 U.S. at 668).

This is the policy which this Court felt would be "significantly frustrated" if the royalty obligation continued to exist until a final adjudication on the patent. As the Court pointed out, this "would give the licensor an additional economic incentive to devise every conceivable dilatory tactic in an effort to postpone the day of final judicial reckoning." (395 U.S. at 673).

The same considerations led this Court in *Blonder-Tongue Laboratories* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), to hold that an adjudication of invalidity of a patent in one circuit precludes an assertion of its validity in another circuit, in the absence of unusual circumstances.

Other decisions in this and lower courts in recent years have consistently aimed at eliminating the elaborate system of procedural advantages which, under prior decisions, had protected the power of patentees to collect and retain royalties on invalid patents: *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Company*, 342 U.S. 180 (1952) (competitor of patentee permitted to seek declaratory judgment of patent's validity); *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U.S. 249 (1945) (assignor of patent permitted to defend infringement suit by assignee on grounds that device was copy of an expired patent); *McGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U.S. 402 (1947) (licensee who raised federal questions as to validity of

patent, its misuse, and price-fixing, permitted to raise issue of patent validity, state contract law to contrary notwithstanding).[3]

The opinions below go in the opposite direction. By adopting the *Drackett* rationale, they deny full and free competition prior to appellate adjudication of invalidity and retain a procedural shield to protect the patent-holder's rights to undeserved royalties.

The *Drackett* rule effectively removes from the public domain an article which legally belongs there. The licensor deserves no royalties for the right to use his invalid patent, because the public already has that right. He is getting something for nothing. A rule which sanctions such a result must be unsound.

The anomaly of a system which permitted and protected the exaction of undeserved royalties was again the target of this Court's opinion in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). Pointing out that

> "A patent yielding returns for a device that fails to meet the congressionally imposed criteria of patentability is anomalous" (402 U.S. at 343),

this Court struck down the old rule permitting re-litigation of patent validity in successive federal circuits.

The decisions of the Court of Appeals in this case reinstate the anomaly of an invalid patent yielding returns, and preserve the effect of the anomaly even after a correct district court decision invalidating the patent. The right to returns on the specious patent

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[3] See also *Edward Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173 (1942).

is preserved all the way up to the date of the final appellate decree. The preservation of a procedural shield to protect and extend the patent-holder's rights to undeserved royalties runs precisely counter to all of the recent principles and patent policies expressed by this Court.

III.

The Opinion Below as to the Counterclaim Is Directly Opposed to the Holding of Lear on the Facts and to the Policy Considerations Underlying Lear

The Court of Appeals' ruling in its second opinion on the counterclaim of Schwinn completely ignores *Lear* and reverts unequivocally to *Drackett*. It held that Troxel was liable until the date of the Ninth Circuit's holding of invalidity because it "did not cease royalty payments" prior thereto.

It is undisputed that Troxel had made its last royalty payment for the quarter ending September 30, 1970, prior to the Ninth Circuit's decision on December 22. It is undisputed that it refused to make the payment which under the terms of the license agreement would have been due January 31, 1971. This is the payment Schwinn sues for.[4]

The granting of Schwinn's counterclaim places the Court of Appeals squarely in conflict with *Lear*. In *Lear*, the licensee had paid no royalties during the time the patent was being challenged in the courts. This Court held that no royalties would be due, if the patent was in fact invalid. In the present case, Troxel

[4] Clearly, as a matter of fact, Schwinn's payments "ceased" with the last payment it made. And that payment was prior to the Ninth Circuit's decision. So the Court is factually in error, on the undisputed record.

has paid no royalties during a part of the time the patent was being challenged in the courts. The Court of Appeals has held that it must, nevertheless, pay royalties for that time, though the patent is invalid. The two rulings cannot be reconciled.

In its second opinion, the Court of Appeals held that "*Drackett* makes it clear that Troxel cannot avoid liability for royalties prior to this date" [the date of final appellate adjudication of invalidity]. (Appendix C, p. 27a). The court thus ruled that patent invalidity was not a defense available to Troxel in the action for unpaid royalties, finding that the contractual obligation to pay royalties continued until the date of "eviction." That precise proposition was rejected by this Court in *Lear*, where in response to the suggestion that Lear should be "required to comply with its contract and continue to pay royalties until its claim is finally vindicated in the courts," this Court concluded that "*such a requirement would be inconsistent with the aims of federal patent policy.*" (395 U.S. at 673).

If the "eviction" rule of *Drackett* is allowed to remain as the law, then the aims of the federal patent policy expressed in *Lear* will be frustrated. Enforcement of the *Drackett* rule would reward dilatory tactics on the part of licensors with doubtful patents, protecting royalty payments until the date of final judgment, a practice expressly disapproved by this Court in *Lear*. (395 U.S. at 673). Furthermore, the *Drackett* rule permits a licensor to recover royalties on an idea which is actually in the public domain, thus undermining "the strong federal policy favoring the full and free use of ideas in the public domain." (395 U.S. at 674).

IV.

The Opinion Below Erred in Not Allowing Recovery of Royalties from the Date of the Judgment of the District Court in California.

Even if it is assumed that the *Drackett* rationale remains good law and is applicable here, the judgment of the Court of Appeals is inconsistent with the rationale of that case. As above stated, the rationale of *Drackett* is that when the licensee's monopoly has been destroyed by an adjudication against the patent then "there has been a complete failure of consideration—an eviction—which should justify a termination of the contract." (63 F.2d at 854). In *Drackett,* this occurred when the District Court for the Southern District of New York declared the subject patent invalid, in a suit in which the licensee *Drackett* was not a party. That case was not appealed.

In the instant case, the Court of Appeals has held that the "eviction" did not occur until the date of the *affirmance* of the District Court's decision by the Ninth Circuit. Of the $125,915.25 in royalties involved in this case, $77,158.55 was paid by Troxel *after* the judgment of the U. S. District Court in California declared the Schwinn patent invalid.

Under the *Drackett* case, the eviction occurs "when, by judicial decree or otherwise, it is published to the world the monopoly is destroyed." (63 F.2d at 854). This obviously occurred in the instant case *when the District Court entered its judgment.* Thereafter Schwinn could not have enjoined any non-licensee from selling the subject bicycle seats. Any "monopoly" enjoyed by Troxel, and any protection against competition from manufacturers who were free from royalty costs, disappeared immediately on the date of

the District Court judgment. Therefore, if *Drackett* were still good law, and if it applied to non-exclusive licenses, as it claims to do, then there was a complete failure of consideration at the time of the District Court judgment, and Troxel is due to recover $77,158.55 from Schwinn.

If the rule established by the Court of Appeals were the law, then by parity of reasoning a petition for certiorari would extend the time for collection of undeserved royalties for another several months, even though it were ultimately denied. There is no instance known to our jurisprudence where the substantive rights flowing from a correct trial court judgment are non-existent until an affirmance on appeal.[5]

V.

The Holdings Below Are in Direct Conflict with Beckman Instruments.

In *Beckman Instruments, Inc.* v. *Technical Development Corp.*, 433 F.2d 55 (1970), *cert. denied* 401 U.S. 976 (1972), the Seventh Circuit was dealing with an appeal from a district court opinion issued shortly before *Lear* and following the licensee estoppel rule. The district court had held the licensee estopped to contest the validity of the patent involved.

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[5] In *A. F. Pylant, Inc.* v. *Republic Creosoting Company*, 285 F.2d 840 (5th Cir. 1961), the court held a Mississippi district court's decision was properly given *res judicata* effect by an Alabama district court, even though the Mississippi judgment had been appealed. See also *Wagner* v. *Reading Company*, 428 F.2d 289 (3d Cir. 1970), where the court held interest on damages would run from the district court's decision appealed from, even though the remand was to determine damages, on the basis of evidence excluded by reason of defendant's objection.

On appeal, the licensor sought to distinguish the case from *Lear* by relying on the correlative doctrine of estoppel by marking of the product with the patent number. The Court of Appeals could find no ground for such a distinction. The court said:

> But defendant's arguments in support of these doctrines sound very similar, namely, that it is unfair for licensees to use the patent and accept the benefits of the license and then attack the validity of the patent. (433 F.2d at 59)

The court held that, even if marking of the product provided additional protection from competition, nevertheless

> [I]t must be noted that the Supreme Court in *Lear* conceded that patent invalidity does not amount to total failure of consideration, but nonetheless held that patent invalidity must be made a complete defense to the obligation to pay royalties. (*Id.*)

The reasoning and holding of the Court of Appeals in this case is precisely contrary to the above. In its second opinion it said

> Troxel's position is that it received no benefits from the license agreement. In *Troxel I* we stated:
>
> > During all this time it had the benefit of freedom from suit for infringement and agreement of Schwinn to attempt to halt unlicensed infringers. It also enjoyed freedom from liability for past infringement. 465 F.2d at 1260
>
> Troxel disagrees by contending that these benefits cannot provide support for the royalties, relying on

> *Lear* v. *Adkins, supra,* 395 U.S. 653 (1969). *Again we reject this argument.* (App. C, p. 25a-26a) (Emphasis supplied)

The argument rejected in *Troxel* is precisely the argument which was accepted in *Beckman.* The conflict is total and irreconcilable. In fact, the "benefits" considered in *Beckman* were much greater than those in *Troxel,* because the *Beckman* license was exclusive, and that of *Troxel* was not, nor was the issue of estoppel by marking raised in the *Troxel* case.

Finally, the *Troxel* holding is directly contrary to the construction placed upon *Lear* by the Second Circuit in *Painton & Company* v. *Bourns, Inc.,* 442 F.2d 216, 226 (1971), where the court said:

> What *Lear* precisely held was that the courts may not enforce a royalty agreement with respect to an invention embodied in an American patent while the licensee was contesting its validity and could recover only when, as and if validity was established.

The court in *Troxel* allowed recovery despite the fact that validity was never established. See also *Horwitt* v. *Movado Watch Agency, Inc.,* 364 F. Supp. 687 (S.D.N.Y. 1973); *Crane Co.* v. *Aeroquip Corporation,* 356 F. Supp. 733 (N.D. Ill. 1973).

CONCLUSION

This Court in *Lear* has unequivocally held that the holder of an invalid patent has no right to royalties from the time the patent issues. It has firmly rejected the suggestion that the patentee should have a right to royalties until the patent is judicially declared invalid.

It has reached this position on the ground of overriding federal patent policy which is against the anomaly of a patent yielding returns on an unpatentable product, and which strongly favors the free use of ideas in the public domain.

The Court of Appeals, in the two opinions here under review, afforded the holder of an invalid patent an absolute right to recover royalties until the date of the final appellate affirmance of a judicial declaration of the patent's invalidity.

The Seventh Circuit in *Beckman* held that, even in the case of an exclusive license, the "benefits" to the licensee do not warrant recovery of a return on an invalid patent. The court of appeals below has held that even the ephemeral "benefits" of a non-exclusive license entitle the licensor to a return on his invalid patent until a final appellate adjudication of invalidity.

The effect of the *Troxel* opinions, if allowed to stand, will be to frustrate federal patent policies adopted by this Court, re-erect procedural shields for invalid patents, and to create confusion by its obvious conflict with *Beckman*.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted, the Court of Appeals' opinions be reversed, and the judgment of the District Court affirmed; or, if the Court should find the *Brackett* rule still to be the law, that the date of "eviction" be determined to be the date of the District Court judgment declaring the invalidity of the patent, and that Petitioner have and recover of Schwinn the

sum of $77,158.55 with interest from the date of the District Court judgment.

Respectfully submitted,

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